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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 800

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS BALOGH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered October 31, 1946 (R. 109), reversing respondent's conviction for refusing to report for induction into the armed forces.

OPINION BELOW

The opinion of the circuit court of appeals (R. 102–108) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 31, 1946 (R. 109), and a

petition for rehearing (R. 109–115) was denied November 19, 1946 (R. 115–116). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal question presented is whether a selectee who refuses to report for induction, as distinguished from one who reports but refuses to submit to induction, is entitled to challenge his selective service classification as a defense in a criminal prosecution for such refusal to report.

The following subsidiary questions arise only if the principal question is answered in the affirmative:

a. Whether in the circumstances of this case it was improper for the board of appeal to consider, together with all the other evidence in respondent's selective service file, an advisory recommendation of a panel on theological classifications which functions in New York City as a part of the Selective Service System.

b. Whether, if a local board member indicated a bias against all Jehovah's Witnesses, that bias vitiates the final classification given respondent by his board of appeal.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, the Selective Service

Regulations, and the Army Regulations are set forth in the Appendix, *infra*, pp. 25–30.

STATEMENT

On February 19, 1946, respondent was indicted (R. 5–6) in the United States District Court for the Eastern District of New York in one count charging that he wilfully failed to report for induction on December 18, 1945, as ordered by his local board, in violation of Section 11 of the Selective Training and Service Act of 1940. At his trial before the court, a jury having been waived (R. 7–8), the Government established that respondent, a Jehovah's Witness who had claimed exemption under the Act as a student preparing for the ministry and as a minister, was finally classified I–A by his board of appeal (R. 11, 55) and that his local board thereafter ordered him to report for induction on December 18, 1945 (R. 11–12, 90–91). Respondent did not report (R. 12–13). Thereafter, in a statement to an F. B. I. agent (R. 99), respondent explained that "I did not report for induction because I claim that I am a minister of the Jehovah's Witnesses Sect."

For his defense, respondent challenged the legality of his selective service classification on the basis of the information in his selective service file, which had been admitted in evidence (R. 10), and at the close of the evidence he moved for a judgment of acquittal because, in his view, he

should have been classified either as a student preparing for the ministry or as a minister, and because the classifying boards had considered an advisory recommendation of the panel on theological classifications which functions as a part of the Selective Service System in New York City (R. 37–39, 42–45). In opposition to this motion, the Government urged that the decision in *Falbo* v. *United States,* 320 U. S. 549, precluded the court from considering the proffered defense of misclassification because respondent had not reported for induction and thus had not exhausted his administrative remedies (R. 39). The trial court ruled, however, that the *Estep* decision, 327 U. S. 114, permitted the court to "consider the whole record and not distinguish between a habeas corpus proceeding and an indictment charging violation of the Selective Service Act" (R. 39–40, 46–47).

In denying respondent's motion for a judgment of acquittal, the trial court held that respondent had been accorded "a full and fair" hearing by the selective service boards and that the boards had not acted arbitrarily or capriciously in classifying him (R. 46–47). In disposing of the question concerning the effect of the use of the advisory recommendation of the theological panel, the court distinguished the decisions in *United States ex rel. Levy* v. *Cain,* 149 F. 2d 338 (C. C. A. 2), and *United States ex rel. Horowitz and Samuels* v. *Pearson,* 151 F. 2d 801 (C. C. A. 3), now pending

on writs of certiorari, Nos. 58 and 59. The court pointed out that in the instant case the names of the members of the panel were disclosed by the selective service file and that, particularly in view of the fact that the local board had previously classified respondent I–A (see p. 7, *infra*), there was no showing that the board blindly accepted the panel's recommendation (R. 45–46, 49–50). Accordingly, the court found respondent guilty and he was sentenced to imprisonment for two years (R. 4, 47).

On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was reversed (R. 109). The court held that respondent's selective service classification was vitiated because the boards had before them the advisory recommendation of the theological panel, and because the court concluded that one local board member had indicated a bias against all Jehovah's Witnesses. However, the court remanded the case for a new trial, instead of ordering that the indictment be dismissed, to afford the prosecution an opportunity to show, if possible, that the recommendation of the panel had no influence on the final classification. Although the Government on the appeal renewed its contention that in a case such as this, involving a failure to report for induction, the defendant is precluded from challenging his classification because of his failure to exhaust his administrative remedies, the Second Circuit did not advert in its opinion to the con-

tention or to the *Falbo* and *Estep* decisions. A petition for rehearing was filed in which the Government again called the court's attention to the applicability of the *Falbo* decision in this case, but the petition was promptly denied without comment (R. 109–116).

The information bearing on the validity of respondent's selective service classification, as shown by his selective service file, may be briefly summarized as follows:

Respondent, having reached the age of eighteen (R. 51), registered with his local board on March 26, 1945, and filed his questionnaire (R. 51–56) on April 13, 1945 (R. 11). In that document, respondent informed the board that he was employed by the Empire Trust Co. as an office clerk and that his usual occupation and that for which he was best fitted was "office work" (R. 52–53). In answering series VIII of the questionnaire, he stated that he had been a minister of religion in the Jehovah's Witnesses sect since September 1944 (R. 53), and that he was also a student preparing for the ministry (R. 54).[1] He requested classification in IV-D (R. 54). At the same time, respondent furnished a written statement to the local board (R. 57–58) in which he said that he had undertaken minister-

[1] In order to qualify for classification in IV-D as a student preparing for the ministry, a registrant must demonstrate that he is pursuing in good faith a full-time course of study (see *infra*, p. 26).

ial studies in September 1944; that beginning in January 1945, "I have from time to time gone into the ministerial service with various ministers of the Watchtower Bible Society, with myself participating therein"; and that because of these activities he was entitled to classification in IV-D.

On April 13, 1945, the local board classified respondent I–A (R. 54), and on April 16 he was ordered to report for a preinduction physical examination (R. 60–61). Respondent reported, and on April 21 he was found physically fit and was issued a certificate of fitness (R. 62–63). Two days later, respondent requested a hearing before the local board (R. 59). Before setting the matter for hearing, the local board referred respondent's file to New York City Selective Service Headquarters for an advisory opinion by the panel on theological classifications (R. 63).

On May 3, City Headquarters advised respondent that (R. 64)

> The Local Board has forwarded the file in your case to this Headquarters for administrative review.
>
> You are requested to appear at the Association of the Bar of the City of New York, 42 West 44th Street, New York City, in Room 605 next Wednesday, May 9th, 1945 at 4:00 P. M. for a special hearing relative to your eligibility for classification in Class IV–D.

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> You will be given an opportunity at that time to discuss your status and submit any additional information you may deem pertinent.

Respondent appeared before the panel, and the transcript of the hearing (R. 69–74) reveals that he stated to the panel that he was not yet a minister, but would become one as soon "as I feel I know enough Bible to tell others" (R. 69); that he first started to attend Jehovah's Witnesses' meetings in September 1944 and that in January 1945 he started studying for the ministry (*ibid.*); that his preparation for the ministry consisted of participating in the religious activities of the sect for seven or eight hours each week (R. 73) as follows: "Tuesday night we study in a home. We study from the Bible. Thursdays are service meetings. Sunday morning we go witnessing and Sunday evening we have the study of the Watchtower magazine" (R. 72); that he did not engage in "backcalling" (*ibid.*); that there are no formal classes for study for the ministry and there are no fixed attendance requirements (*ibid.*); that to have authority to perform rites or officiate at ceremonies the individual must be appointed to be a "company servant" or "backcall servant" or he "might be given the privilege of calling on people" (R. 74); that he possessed no authority to perform marriages (*ibid.*); and that he worked at a full-time job as a clerk in a bank working

eight hours each day, Monday through Friday, and one-half day on Saturday (R. 73).

Thereafter, the City Director's office wrote the local board as follows (R. 76–77):

> At the request of this Headquarters the above named registrant appeared before the appropriate division of our Advisory Panel on Theological Classifications. Transcript of registrant's examination by the panel, together with the panel's report in the matter, are enclosed herewith.
>
> Registrant appeared before the following panel members: Mr. George H. Richards, Dr. David E. Roberts and Rev. James H. Robinson.
>
> While the panel's report should be considered together with the other information in the file, the responsibility of determining the registrant's status rests in the first instance with the Local Board, and the Board's determination in every case must be predicated upon the exercise of its own deliberative and independent judgment.

The advisory opinion of the panel (R. 65–68) set forth the pertinent provisions of the statute and regulations and stated that "the word 'minister' was used and intended by Congress in the ordinary accepted use of the term to mean one duly set apart from the body of members to perform special duties," and that since the designation of "minister" is applied by the sect to all Jehovah's Witnesses, the test in the case was whether respondent in fact possessed different

reponsibilities and functions than other persons who are only members of the sect (R. 66); that "if a Jehovah's Witness claims IV–D classification, the Local Board should ascertain whether by his own course of life he has become entitled to a special status—apart from most Jehovah's Witnesses—as a minister by reason of the amount of time he gives to teaching and preaching the religion of his sect and not merely the performance of the administrative duties thereof" (R. 68). The opinion concluded (*ibid.*) that in view of the limited nature of respondent's religious activities as shown at the hearing, he was not a full-time student preparing for the ministry or a minister of religion within the meaning of the statute and regulations.

On November 5, 1945, respondent was given the hearing before the local board which he had previously requested (R. 55). An extensive hearing was held, in which respondent testified under oath and again set forth the basis of his claim to exemption from military service (R. 77–87). At the close of the hearing, the board reaffirmed the I–A classification it had previously given him (R. 55). On November 16, 1945, he appealed to his board of appeal (R. 54, 88). His entire file, including the materials from the panel on theological classifications (see R. 89), was forwarded to the board of appeal, and on December 3, 1945, that board classified him I–A (R. 55).

On December 6, 1945, the local board ordered respondent to report for induction on December 18 (R. 90–91) and, as we have shown, *supra*, p. 3, he did not report.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding, *sub silentio*, that a selectee who did not report for induction as ordered and thus was never finally accepted for military service may nevertheless challenge his classification as a defense to an indictment charging that he refused to report for induction.

2. In not adhering to the decisions of this Court in *Falbo* v. *United States*, 320 U. S. 549, and *Estep* v. *United States*, 327 U. S. 114.

3. In holding that consideration of the advisory recommendation of the panel on theological classifications by the classifying boards vitiated respondent's selective service classification.

4. In holding that an expression of bias against all Jehovah's Witnesses by a local board member affects a final classification made by the board of appeal.

5. In reversing the judgment of conviction.

REASONS FOR GRANTING THE WRIT

1. The facts demonstrate beyond dispute that respondent did not report for induction, that he did not undergo the final physical examination at

the induction station, that he has not been finally accepted for military service, and, therefore, that he has not exhausted his administrative remedies. In these circumstances, this Court's decisions in *Falbo* v. *United States,* 320 U. S. 549, and *Estep* v. *United States,* 327 U. S. 114, foreclose his proffered defense of misclassification. Nevertheless, the circuit court of appeals reversed the conviction because the court concluded that respondent's classification was invalid. Although the Government argued the *Falbo* point in its brief in the circuit court of appeals and on oral argument, the court failed to discuss the question in its opinion; a petition for rehearing (R. 109–115) again raising the point was denied without comment. The decision of the court amounts to a refusal, *sub silentio,* to adhere to the decisions in the *Falbo* and *Estep* cases.[2] In the circumstances,

[2] There are numerous cases which, the Department's files show, involved similar facts and the same selective service procedure as in the present case, and in which the defense of misclassification was not allowed. See, e. g., *Penley* v. *United States*, 145 F. 2d 748 (C. C. A. 1); *United States* v. *Flakowicz*, 146 F. 2d 874 (C. C. A. 2), certiorari denied, 325 U. S. 851; *Stull* v. *United States*, 141 F. 2d 494 (C. C. A. 4), certiorari denied, 322 U. S. 745; *Cahoon* v. *United States*, 152 F. 2d 752 (C. C. A. 5), certiorari denied October 14, 1946, No. 183; *Skisano* v. *United States*, 149 F. 2d 645 (C. C. A. 6); *United States* v. *Rinko*, 147 F. 2d 1 (C. C. A. 7), certiorari denied, 325 U. S. 851; *Pacman* v. *United States*, 144 F. 2d 562 (C. C. A. 9), certiorari denied, 323 U. S. 786. See also our briefs in opposition in the following cases: *Cahoon*, No. 183, Oct. T. 1946, pp. 7–10; *Flakowicz*, No. 1072, Oct. T. 1944, pp. 4–7; *Rinko*, No. 1071, Oct. T. 1944, pp. 8–10.

we think the circuit court of appeals has so far departed from the controlling decisions of this Court as to call for an exercise of the Court's power of supervision.

Except for the fact that in the *Falbo* case the selectee was ordered to report to a civilian public service camp, rather than to an induction center, the material facts of this case are identical with the facts of the *Falbo* case. In that case the selectee had been classified as a conscientious objector, had passed a pre-induction physical examination, and was ordered to report for work of national importance. He failed to report. Since he still might have been rejected by the civilian public service camp to which he was assigned,[3] this Court held that he had failed to exhaust his administrative remedies and was therefore foreclosed from challenging his classification in the criminal trial. The *Estep* decision reaffirmed the

[3] The Court pointed out in the *Falbo* opinion that figures compiled by the Government showed that, "as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected." 320 U. S. at 553.

After his conviction was affirmed, Falbo unsuccessfully resorted to habeas corpus to assert the contention that when he passed the preinduction physical examination, he had exhausted his administrative remedies. See *United States ex rel. Falbo* v. *Kennedy*, 141 F. 2d 689 (C. C. A. 4), certiorari denied, 322 U. S. 745. In the *Estep* opinion, the Court characterized *Falbo's* case as one in which habeas corpus was denied because "additional steps in the selective service procedure remained to be taken." 327 U. S. at 124–125.

Falbo rule, pointing out that there is no judicial review prior to the time the registrant has taken all the steps in the selective process and has been finally accepted by the armed forces. The rule was held not to be applicable in *Estep's* case, because he had reported for induction and had been finally accepted at the induction station.

At best, respondent here is in the same position as Falbo. While he was found to be physically fit after a preinduction physical examination on April 21, 1945 (R. 60–63), this was not the final determination of his acceptability by the military forces, which Section 3 (a) of the Selective Training and Service Act requires as a condition precedent to induction. Under the procedure in effect since February 1944 (see *Billings* v. *Truesdell*, 321 U. S. 542, 554–555),[4]

[4] The preinduction examination system was created to comply with Section 5 of the Act of December 5, 1943, 57 Stat. 599, which provides:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for

when a selectee reports for induction he must undergo, *inter alia,* a physical inspection to determine his final acceptability for service. The examination is by military personnel and the procedure involved is prescribed by Army Regulations. Thus paragraph 15 of AR 615–500, August 10, 1944 (*infra,* pp. 27–30), provides that the registrants who report for induction will be divided into two classes: (1) registrants who are to be given a "complete examination," and (2) registrants whose preinduction examinations remain valid and who are to be given a "physical inspection." Subparagraph (e) of paragraph 15 provides:

> e. *Registrants forwarded for induction.*— Registrants forwarded for induction will ordinarily have had a preinduction physical examination within 90 days and will require only a physical inspection. Registrants so forwarded, who have not been previously examined, or who have been previously examined and found not acceptable, or who have been examined and found

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military service as a result thereof, shall remain so classified and report for induction in regular order."

It has been argued that by virtue of this statute certification of fitness upon preinduction examination constitutes the final determination of the registrant's acceptability. But this argument overlooks the words of the statute which provide for a preinduction examination "subject to reexaminations." Consistently with the statute, the Army Regulations, as we show, provide for such a reexamination when the registrant reports for induction.

acceptable more than 90 days previously, will be given a complete examination. The preinduction physical examination will be void after 90 days from the date of the examination shown on DSS Form No. 221.

(1) *Physical inspection.*—Registrants found acceptable for military service on preinduction physical examination and reporting to an armed forces induction station on order to report for induction within 90 days of such examination, will be given a careful physical inspection, with all clothing removed, for contagious diseases, apparent defects, and intercurrent illness or injury. Such registrants will be rejected only under exceptional circumstances which indicate marked deterioration in physical condition, or error or omission by the preinduction examining personnel.

* * * * *

In the present case, respondent underwent his preinduction examination on April 21, 1945, more than 90 days prior to December 18, 1945, when he was required to report for induction. In these circumstances, paragraph (e) provides that the preinduction examination is void and that the selectee shall be given a "complete examination." Thus, it seems plain that unless and until respondent reported to the induction station and underwent the "complete examination," there could have been no final determination of his acceptability.

There is no question that respondent knew that his final acceptability would be determined when he reported for induction, for the order to report for induction instructed him (R. 90–91) that after reporting to the local board and being transported to an induction station

> You will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.
>
> Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. * * *

Because of his refusal to report, respondent never reached the induction station and he never underwent the processing—physical, mental and otherwise—by which his acceptability to the armed forces might have been determined.

Apart from the facts of this case, experience demonstrates that reporting for induction and undergoing the final physical inspection at the induction station are an integral part of the process by which the final determination of the selectee's acceptability for service is determined. We are advised by the Director of Selective Service that during the period from February 1944 to June 1946 approximately 2,600,000 selectees were examined for induction into the armed

forces after previously having been found acceptable upon preinduction examination, and that of these approximately 230,000 men were rejected. In the *Falbo* case, this Court relied upon similar statistics as demonstrating under a similar procedure that the final determination of acceptability had not occurred where the selectee did not report to the camp (see *supra*, p. 13). In the *Estep* case, which involved the same procedure as this case, the Court assumed that the selectee was required to report to the induction station and be accepted before he had exhausted his remedies.

Undisputably, respondent's acceptability for military service has not yet been finally determined, because he refused to report for induction, and he has therefore failed to exhaust his administrative remedies. On the authority of the decisions in the *Falbo* and *Estep* cases, we submit that the decision below is plainly erroneous and that it would be appropriate without more to grant the writ of certiorari and reverse the judgment of the circuit court of appeals on the ground that it is not compatible with the decisions of this Court. Cf. *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715, rehearing denied, 320 U. S. 816.

2. As we have shown, the decision below improperly considered the merits of respondent's defense of misclassification. While it is perhaps unnecessary to consider that question, we believe

that the court's decision on the merits is likewise erroneous.

a. *The advisory recommendation of the panel.* The principal basis for the decision below was the fact that the selective service boards considered the advisory recommendation of the panel on theological classifications which functions in New York City as a part of the Selective Service System. The question of the propriety of this practice is presently before the Court for decision in *Eagles* v. *United States ex rel. Horowitz and Samuels,* Nos. 58 and 59, this Term. The arguments in support of the practice are known to the Court, and we shall not reassert them here. There are, however, two points of distinction between the *Horowitz* and *Samuels* cases and this case to which we shall advert.

In the present case, the names of the members of the panel were submitted to the local board, together with the opinion of the panel and the transcript of its hearing (see R. 76).[8] Thus, there can be no question that the classifying boards were aware of the identity of the members. Insofar as respondent is concerned, he had an opportunity to ascertain the names of the members of the panel when he appeared before it, and thereafter the information was in his selective

[8] To meet the requirement of the Second Circuit's decision in *United States ex rel. Levy* v. *Cain*, 149 F. 2d 338, the Selective Service System as a matter of practice now submits this information to the local board in every case.

service file. Section 605.32 of the Selective Service Regulations[6] guaranteed to him the right to inspect his file and thus to ascertain this information if he desired it. There is no showing that respondent ever sought the information, or that he ever sought to challenge the competence of the members of the panel. We do not think that one who closes his eyes to available information may thereafter complain that he was not furnished that information. And, we submit, the court below is in error in asserting that because respondent "may have been unaware" of the names of the panel members (R. 107), his classification is vulnerable. Assuming that the defense of illegal classification was open to him, it was for respondent to show that his classification was invalid, and that burden was not satisfied here merely by supposing that respondent may have been unaware of the names of the panel members.

The other point of difference between this case and the *Samuels* and *Horowitz* cases relates to the religious affiliation of the members of the panel. In the latter cases, representative mem-

[6] Section 605.32 provides in part:

"*Information not confidential as to certain persons.* No information in a registrant's file shall be confidential as to the persons designated in this section, and any information may be disclosed or furnished to or examined by such persons, namely:

"(1) The registrant, or any person having written authority from the registrant."

bers of the Jewish faith rendered advisory opinions in cases involving registrants who claimed to be students preparing for the ministry in that faith. In this case the three members of the panel were members of the Protestant faith, and the court below held that it was improper for the classifying boards to consider their advisory opinion concerning the status of a member of the Jehovah's Witnesses sect.

In our view, no registrant claiming exemption from service as a minister or as a student preparing for the ministry has a right to have his claim judged by members of his particular faith. If there were such a right, neither the Selective Service System nor the courts could possibly perform their functions under the Act. We recognize that where members of one religious group render an advisory opinion concerning the ministerial status of a member of another group, there exists a possibility that the claim will be judged according to standards of the former group. But, in our view, the mere existence of this possibility ought not to invalidate the action of the theological panel. Instead, in each case the proceedings must be scrutinized to make sure that the registrant has been accorded a fair hearing.

Turning to the transcript of respondent's hearing before the panel, we are unable to find any semblance of abuse. Rather, the hearing, in our judgment, reflects an attitude of fairness and understanding on the part of the members of the

panel (see R. 69–74). The opinion of the panel (R. 65–68) demonstrates that the panel fairly appraised respondent's claims to exemption in the light of the pertinent statutory and regulatory provisions. Consistently with the view of the Selective Service System,[7] the Department of Justice and the courts which have passed on the question,[8] the panel concluded that not every Jehovah's Witness is a minister of religion within the meaning of Section 5 (d) of the Act. The panel correctly recommended that only those members of the sect whose status is different from that of the ordinary member are entitled to exemption and that the local board should ascertain in each case whether the registrant by his own course of life has become entitled to the status of a minister by reason of the amount of time he gives to teaching and preaching the religion of the sect. On the facts of this case, we submit that the panel reached the only conclusion possible—that a Jehovah's Witness who works full-time as a bank clerk and who devotes seven or eight hours each week to religious activities is neither a minister of religion nor a full-time student preparing for the ministry within the meaning of the act and regulations (see *infra*, pp. 25–27).

[7] See Opinion No. 14 of the Director of Selective Service, quoted in the court's opinion (R. 105–106).

[8] See, e. g., *Sunal* v. *Large*, 157 F. 2d 165, 175 (C. C. A. 4), pending on petition for a writ of certiorari, No. 535, this Term, and cases cited.

b. The circuit court of appeals also thought that a member of the local board expressed a bias against all Jehovah's Witnesses and that this, too, detracted from the validity of respondent's classification (see R. 106–107). We think that the ambiguous statement of the board member to which the court referred was merely an expression of belief that respondent, not all Jehovah's Witnesses, was seeking to evade military service (see R. 87).[9] In any event, however, the asserted bias of the local board member is not relevant. For respondent was finally classified by his board of appeal, and there is no showing whatever that any member of that board was biased. See *Bowles* v. *United States,* 319 U. S. 33; *Falbo* v. *United States,* 320 U. S. 549, 555 (concurring opinion).

CONCLUSION

For the reasons stated, we submit that this petition for a writ of certiorari should be granted, and that, in the circumstances, it would be appropriate for this Court to reverse the

[9] The statement in question was made at the close of respondent's hearing before the local board on November 5, 1945 (see p. 10, *supra*) as follows:

"Your contention is untrue that the reason why there are no members of Jehovah's Witnesses in the armed forces is that they keep themselves apart from the world. They don't keep themselves apart from the world any more than you do—so how could you say you would be serving man by entering the Army or Navy. All that you are interested in is evading the service of your country."

judgment below without further briefs or argument.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

DECEMBER 1946.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

1. Section 5 of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 305) provides, in part, as follows:

> (d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

2. Section 622.44 of the Selective Service Regulations provides:

> *Class IV–D: Minister of religion or divinity student.*
>
> (a) In Class IV–D shall be placed any registrant:
>
> (1) Who is a regular minister of religion, or
>
> (2) Who is a duly ordained minister of religion, or
>
> (3) Who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than one year prior to the date of enactment of the Selective Training and Service Act of 1940 (September 16, 1940), or (4) Who has been accepted for admittance to a theological or divinity school referred to in subparagraph (3) above and who, under the general direction of such

theological or divinity school, is pursuing a course of study required by the theological or divinity school in which he has been accepted for admittance and who has been formally accepted as a candidate for the ministry by the highest authority governing ordination of a recognized church, religious sect, or religious organization.

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

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3. Local Board Memorandum No. 187, as amended, an official interpretation of Section 622.44 of the Selective Service Regulations, provides in part, as follows:

2. *Student preparing for the ministry.*— (a) In order to qualify for classification in Class IV–D as a student preparing for the ministry, a man must be pursuing in good faith a full-time course of study for which credit will be given toward the completion of his training in the school which he attends, and it must be evident that he is

preparing himself to become a regular or duly ordained minister of religion. The course of study may be carried on in the theological or divinity school or in another institution. Where carried on in another institution, the student's course of study must be under the general direction of the theological or divinity school in which he has been accepted.

(b) The "full-time" nature of the course of study is established when the student is carrying a course similar to that normally designed in schools to occupy the full academic interest of a student. It would be similar to the type of course pursued by a student in order to complete a so-called four-year college course leading to the Bachelor's degree in eight semesters with a normal load of approximately sixteen hours of recitation per week. In a high school it would normally be equivalent to four class recitation periods per day. If a student is making satisfactory progress toward the completion of his course of study, a moderate amount of outside employment does not render the course less than "full-time."

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4. Army Regulations 615–500, August 10, 1944, provide in part, as follows:

15. Procedure.—*a. General.*—All registrants reporting to the armed forces induction stations will be examined on the day they report and the examination completed that day if practicable. Most registrants have their first contact with the Army at armed forces induction stations. It is important that they be treated with kindness and given courteous consideration. The personnel at armed forces induction sta-

tions will bear this in mind and at no time will a registrant be ordered about or spoken to in a rude or discourteous manner.

b. *Meeting and checking men.*—Registrants forwarded for preinduction physical examination or for induction will normally arrive at the armed forces induction station in groups, in charge of one of the registrants appointed as a leader by the local board. Local boards will notify the commanding officer of the armed forces induction station of the hour of arrival of each group sent. Guides and transportation from railroad or bus stations may be furnished when required. The leader of each group will have DSS Form No. 217 (Physical Examination List) in quadruplicate, or DSS Form No. 151 (Delivery List) in quadruplicate, whichever is appropriate, or both, showing the designation, number, and address of the local board from which the group was forwarded, and containing the names of all registrants in the group, and DSS Form No. 221, original and two copies for each man in the group. The men will be checked against the above lists. All registrants listed on Form No. 217 will be routed to the first station of the complete examination. Registrants listed on Form No. 151 will be divided into two groups:

(1) Those requiring a complete examination.

(2) Those requiring a physical inspection.

c. *Physical examination procedure.*—For each registrant requiring a complete examination, a medical work sheet will be initiated upon which will be entered the registrant's name and the number of his local board. The registrant will sign his medical work sheet and his name will be com-

pared with his name on the DSS Form No. 221. He will then be directed to the first examining station. His medical work sheet and other records will be kept in his possession throughout the examination; care will be exercised at each examining station to prevent the possibility of "crossing" registrants' records.

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e. *Registrants forwarded for induction.*— Registrants forwarded for induction will ordinarily have had a preinduction physical examination within 90 days and will require only a physical inspection. Registrants so forwarded, who have not been previously examined, or who have been previously examined and found not acceptable, or who have been examined and found acceptable more than 90 days previously, will be given a complete examination. The preinduction physical examination will be void after 90 days from the date of the examination shown on DSS Form No. 221.

(1) *Physical inspection.*—Registrants found acceptable for military service on preinduction physical examination and reporting to an armed forces induction station on order to report for induction within 90 days of such examination, will be given a careful physical inspection, with all clothing removed, for contagious diseases, apparent defects, and intercurrent illness or injury. Such registrants will be rejected only under exceptional circumstances which indicate marked deterioration in physical condition, or error or omission by the preinduction examining personnel.

(2) *Registrants reporting for induction who have positive serology.*—Registrants who are forwarded by Selective Service local boards on order to report for induc-

tion will be held over if necessary at the armed forces induction station until reports on the serological tests for syphilis are obtained. All registrants whose records indicate a positive serological test for syphilis will be held over until the results of spinal fluid surveys for evidence of central nervous system syphilis have been accomplished. Should the spinal fluid survey of a registrant indicate cerebrospinal syphilis, or other examination show evidence of cardio-vascular or visceral syphilis, the registrant will be rejected.

(3) Registrants found acceptable will be allocated to the Army and Navy as prescribed in paragraph 14. Those rejected will be returned to the local boards which forwarded them. The disposition of each registrant will be indicated on DSS Form No. 151

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